UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

BK SALONS, LLC, a California Limited Liability Company dba POMP SALON, Plaintiff, v. GAVIN NEWSOM, in his official capacity as Governor of California, et al., Defendants.	No. 2:21-cv-00370-JAM-JDP **ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH PREJUDICE**

BK Salons, LLC ("Plaintiff") owns and operates a hair salon in Stockton, California impacted by State and Regional Public Health Orders enacted to stop the spread of COVID-19. Compl. ¶ 1, ECF No. 1. Plaintiff filed this Section 1983 action against Gavin Newsom, Rob Bonta[1], and Erica S. Pan ("Defendants") in their official capacities as Governor, Attorney General, and Acting State Public Health Officer. Id. ¶¶ 6, 9-11. Plaintiff

[1] Rob Bonta was appointed Attorney General of California and has been substituted for former Attorney General, Xavier Becerra, pursuant to Fed. R. Civ. P. 25(d).

asserts five federal constitutional claims: (1) a substantive due process claim under the Fifth and Fourteenth Amendments, (2) an equal protection claim under the Fourteenth Amendment, (3) a procedural due process claim under the Fifth and Fourteenth Amendments, (4) an excessive fines / cruel and unusual punishment claim under the Eighth Amendment, and (5) a freedom of assembly claim under the First Amendment. Id. ¶¶ 63-119. Plaintiff seeks declaratory and injunctive relief. Id. at 28.

Defendants move to dismiss the action.[2] Mot. to Dismiss ("Mot."), ECF No. 9-2. Plaintiff filed an opposition. Opp'n, ECF No. 11. Defendants replied. Reply, ECF No. 13. Additionally, the parties submitted supplemental briefs on the issue of mootness. See Defs.' Supp. Brief, ECF No. 18; Pl.'s Supp. Brief, ECF No. 19.

This Court has previously addressed several constitutional challenges arising out of the COVID-19 pandemic. See Excel Fitness v. Newsom, No. 2:20-cv-02153-JAM-CKD, 2021 WL 795670 (E.D. Cal. March 2, 2021); Givens v. Newsom, No. 2:20-cv-00852-JAM-CKD (E.D. Cal. 2020); Cross Culture Christian Ctr. v. Newsom, No. 2:20-cv-00832-JAM-CKD (E.D. Cal. 2020); Best Supplement Guide, LLC, v. Newsom, No. 2:20-cv-00965-JAM-DKC (E.D. Cal. 2020). Each time, the Court has emphasized that the pandemic "context matters because the Public Health Orders being challenged in these lawsuits have been enacted to stop the spread of COVID-19 and keep Californians safe. As such, not every harm

[2] This motion was determined to be suitable for decision without oral argument. E.D. Cal. L.R. 230(g). The hearing was scheduled for June 22, 2021.

flowing from these Orders can be legally cognizable, let alone rise to the level of a constitutional violation." Excel Fitness, 2021 WL 795670 at *1. So too here.

In granting Defendants' motion to dismiss, this Court joins a growing list of courts in this state that have dismissed substantially identical claims challenging the same state COVID-19 Orders. See e.g. Mission Fitness Center, LLC v. Newsom, 2:20-cv-09824-CAS-KSx, 2021 WL 1856552 (C.D. Cal. May 10, 2021) (granting motion to dismiss in challenge by gym-owners); MetroFlex Oceanside LLC v. Newsom, No. 20-cv-2110-CAB-AGS, 2021 WL 1251225 (S.D. Cal. Apr. 5, 2021) (granting motion to dismiss in challenge by gym-owners); Culinary Studios, Inc. v. Newsom, No. 1:20-cv-1340-AWI, 2021 WL 427115 (E.D. Cal. Feb. 8, 2021) (granting motion to dismiss in challenge by a group of restaurant, gym, and other business owners).

I. BACKGROUND

In March 2020, Governor Newsom began issuing stay-at-home orders to combat the spread of COVID-19. Compl. ¶¶ 4, 15-19; see also Governor Newsom's March 12, 2020 Executive Order, Ex. 3 to Compl.; Governor Newsom's March 19, 2020, Stay-at-Home Order, Ex. 4 to Compl; Governor Newsom's May 4, 2020 Executive Order, Ex. 5 to Compl. Under these orders, Plaintiff's salon, Pomp Salon, was required to close from March to early June 2020. Compl. ¶¶ 1, 18, 26. In June 2020, Plaintiff was authorized to reopen and operate indoors at limited capacity; however, Plaintiff incurred significant costs to operate in compliance with Defendants' Orders. Id. ¶¶ 26-27. On July 13, 2020, the State once again mandated the closure of salon and hair care services. Id. ¶ 27.

The public health orders changed again in August 2020 with the enactment of the Blueprint for a Safer Economy and its color-coded tier system. Id. ¶ 28. Under this tier system, salons, including Plaintiff's, were required to: (1) cease all indoor salon services in the purple tier; (2) limit indoor salon services capacity to 25% in the red tier; or (3) limit indoor salon services to 50% in the orange and yellow tiers. Id.

On December 3, 2020, due to rising COVID-19 cases and hospitalizations, Governor Newsom announced regional stay-at-home orders. Id. ¶¶ 35-39[3]; see also State's December 3, 2020 Regional Stay at Home Order, Ex. 1 to Compl; State's December 6, 2020 Supplemental Regional Order, Ex. 2 to Compl. Under these orders, Plaintiff was required to close again. Compl. ¶ 40. Plaintiff, however, continued to offer its salon services to the public in violation of these orders. Id. ¶¶ 1, 8. As a result, Plaintiff was subject to an enforcement action that made national news. Id. ¶ 1 n.2.

On January 12, 2021, the Regional Order for the Sacramento Region was lifted, and Plaintiff resumed operations. Id. ¶ 40 n.13.

II. OPINION

A. Request for Judicial Notice

Defendants request the Court take judicial notice of seven exhibits: (1) the Centers for Disease Control and Prevention's ("CDC") COVID Data Tracker and its publicly reported data as of

[3] The allegations in these paragraphs address the Regional Order for the "Southern California Region," although Pomp Salon is not located in that region. See Compl. ¶¶ 35-38.

April 22, 2021; (2) the State's "Tracking COVID-19 in California" Dashboard and its publicly reported data as of April 22, 2021; (3) the CDC's October 5, 2021, Science Brief; (4) the State's Beyond the Blueprint for a Safer Economy Memorandum; (5) the State's Blueprint for a Safer Economy Framework as of April 27, 2021; (6) the State's Blueprint for a Safer Economy Activity and Business Tiers as of April 19, 2021; and (7) the State Blueprint Data Chart as of April 27, 2021. See Defs.' Req. for Jud. Notice ("RJN"), ECF No. 9-1. Plaintiff challenges this request. See Opp'n at 3-9.

After reviewing each exhibit and considering Plaintiff's arguments in opposition, the Court finds all exhibits to be matters of public record and therefore proper subjects of judicial notice. Accordingly, the Court GRANTS Defendants' Request for Judicial Notice. However, the Court takes judicial notice only of the existence of these documents and declines to take judicial notice of their substance, including any disputed or irrelevant facts within them. Lee, 250 F.3d at 690; see also Gish v. Newsom, No. EDCV 20-755-JGB(KKx), 2020 WL 1979970 at *2 (C.D. Cal. April 23, 2020) (recognizing courts judicially notice only "the contents of the documents, not [the] truth of those contents").

B. Mootness

On June 15, 2021, California fully reopened its economy and moved beyond the Blueprint for a Safer Economy. See Beyond the Blueprint for Industry and Business Sectors Effective June 15, available at https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/Beyond-Blueprint-Framework.aspx. In light of this

directive, the Court ordered supplemental briefing as to whether the case or some of the issues raised by the litigation were moot. See Supp. Briefing Order, ECF No. 17.

Defendants contend the case should be dismissed as moot since the "entire legal framework [] has now been dismantled because COVID-19 conditions in the State have improved so significantly." Defs.' Supp. Brief at 3. Defendants further argue that neither the voluntary cessation exception to mootness nor the capable of repetition yet evading review exception apply here. Id. at 5-9. Plaintiff counters that the capable of repetition yet evading review exception does apply and that the case is not moot under the Supreme Court's recent decision in Uzuegbunam v. Preczewski, 141 S.Ct. 792 (2021). Pl.'s Supp Brief at 3-8. As an initial matter, Plaintiff's Uzuegbunam argument fails because as Plaintiff concedes, it has "not asked for damages in [the] Complaint." Id. at 6. Uzuegbunam, a decision concerning nominal damages, is inapposite because nominal damages have not been pled here in the operative complaint. See generally Compl. That Plaintiff intends to file a motion to amend the complaint in light of Uzuegbunam, see Pl.'s Supp. Brief at 6, does not change this analysis.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Rosebrock v. Mathis, 745 F.3d 963, 971 (9th Cir. 2014) (internal citations omitted). However, voluntary cessation of challenged conduct does not necessarily render a case moot. Id. This is because "dismissal

for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." Id. Courts presume that a government entity is acting in good faith when it changes its policy. Id. But courts "are less inclined to find mootness where the new policy could be easily abandoned or altered in the future." Id. at 972 (internal citation omitted). Finally, the party asserting mootness bears a "heavy burden" to show that "the challenged conduct cannot reasonably be expected to reoccur." Id. at 972.

Here, Defendants have not met their burden to show the case is moot. Defendants' response to this unprecedented pandemic has necessarily been ever-evolving. But its ever-evolving nature gives the Court pause. The Delta variant is rising in California in spite of the increasing number of vaccinated Californians. See https://www.cdph.ca.gov/Programs/CID/DCDC/Pages/COVID-19/COVID-Variants.aspx (last accessed July 12, 2021); see also Pl.'s Supp Brief at 4. It is therefore conceivable that Defendants may need to reimpose restrictions. Indeed, as Plaintiff emphasizes, Governor Newsom's recent public comments confirm as much. Pl.'s Supp. Brief at 4-5. For these reasons, Defendants have not shown that "the challenged conduct cannot reasonably be expected to reoccur." Rosebrock, 745 F.3d at 972.

Because the voluntary cessation exception to mootness applies[4], the case is not moot.

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[4] As the Court finds the voluntary cessation exception applies, it does not reach the issue of whether the capable of repetition yet evading review exception also applies.

C. 12(b)(6) Standard

A Rule 12(b)(6) motion challenges the complaint as not alleging sufficient facts to state a claim for relief. See Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss [under 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (internal quotation marks and citation omitted). In considering a motion to dismiss for failure to state a claim, the court accepts as true the allegations in the complaint and construes the pleading in the light most favorable to the party opposing the motion. Lazy Y Ranch LTD. v. Behrens, 546 F.3d 580, 588 (9th Cir. 2008).

D. 12(b)(6) Analysis

As an initial matter, Plaintiff dedicates much of its opposition to arguing that Defendants' motion is a "procedurally improper attempt to cast a summary judgment motion as a motion to dismiss" which misuses judicially noticed material. Opp'n at 1-9. This characterization of the motion is inaccurate. See generally Mot.; see also Reply 1-2. Further, the Court need not wait until a later stage of the case to resolve Plaintiff's claims. Constitutional claims — both facial and as-applied challenges — are subject to dismissal under Rule 12(b)(6) if the alleged facts fail to state a claim. See O'Brien v. Welty, 818 F.3d 920, 929-32 (9th Cir. 2016).

Finally, this Court is well-aware of the "bed-rock principles" governing motions to dismiss that Plaintiff emphasizes in its brief: "that the factual allegations in a complaint are to be taken as true, that such allegations must be

construed in a light most favorable to plaintiff . . . and that the Court should not engage in premature fact-finding in considering a motion to dismiss but instead should constrain its review to the legal sufficiency of the pleading." Opp'n at 1.

As explained below, applying these familiar standard to the case at bar, the Court finds Plaintiff has not stated a claim. In reaching this conclusion, the Court focuses on the allegations in the complaint, not on Defendants' judicially noticed exhibits – which, to repeat, the Court takes notice only of their existence not their substance including any disputed facts within them. See Lee, 250 F.3d at 690; see also Gish, 2020 WL 1979970 at *2.

1. Substantive Due Process Claim

Plaintiff first brings a substantive due process claim. Compl. ¶¶ 63-69. Plaintiff alleges the Blueprint for a Safer Economy and the Regional Orders "have had a disparate impact on Plaintiff and have unfairly targeted Plaintiff's business, specifically their ability to earn a living by conducting their nail, hair, skincare services, despite the total lack of scientific evidence or data to support the implementation of the Orders as applied to Plaintiff." Id. ¶ 66. As such, Plaintiff has been deprived of "constitutionally protected liberties and rights." Id. Further, Plaintiff alleges "the disparity in exemptions . . . is causally related to state officials, such as Newsom, supporting their campaign donors at the expense of small businesses and has nothing to do with science and data." Id. ¶ 52; see also Opp'n at 9 (referring the Court to ¶ 52).

"Substantive due process cases typically apply strict

scrutiny in the case of a fundamental right and rational basis review in all other cases." Witt v. Dep't of Air Force, 527 F.3d 806, 817 (9th Cir. 2008). Fundamental rights are those "objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997) (internal quotation marks and citations omitted).

As Defendants argue, "temporary restrictions on how Plaintiff may serve customers at a hair salon do not implicate fundamental rights that would call for heightened scrutiny." Mot. at 6. Neither the Supreme Court nor the Ninth Circuit has ever held that the right to work or pursue a business enterprise is fundamental right entitled to heightened constitutional scrutiny. Sagana v. Tenorio, 384 F.3d 731, 743 (9th Cir. 2004). Indeed, the Ninth Circuit has recently confirmed that this is not a fundamental right and the proper level of review for this type of claim is rational basis. See Slidewaters LLC v. Washington State Dep't of Lab. & Indus., No. 20-35634, 2021 WL 2836630 at *7 (9th Cir. July 8, 2021) (instructing "the right to pursue a common calling is not considered a fundamental right" and the "proper test for judging the constitutionality of statutes regulating economic activity is whether the legislation bears a rational relationship to a legitimate state interest"); see also Tandon v. Newsom, 992 F.3d 916, 930 (9th Cir. March 30, 2021) ("We have 'never held that the right to pursue work is a fundamental right,' and, as such, the district court likely did not err in applying rational basis review to their due process

claims.") As such, the Court finds no fundamental right is at stake and rational basis review applies.

The "judicial review which applies to laws infringing on nonfundamental rights [is] a very narrow one" and is satisfied if the Government "could have had a legitimate reason for acting as it did." Sagana, 384 F.3d at 743. "Under rational-basis review, '[t]he burden falls on the party seeking to disprove the rationality of the relationship between the classification and the purpose.'" United States v. Navarro, 800 F.3d 1104, 1113 (9th Cir. 2015).

Here, Plaintiff insists it has "sufficiently disproved the rationality" of the Orders. Opp'n at 10. The Court does not agree. To the contrary, the challenged Orders easily meet the rational basis standard: the Orders were enacted for the legitimate purpose of curbing the spread of COVID-19 and are rationally related to that purpose because the Orders reduce the number of people from different households mixing indoors where the spread of COVID-19 occurs most readily. Accord Disbar Corp. v. Newsom, No. 2:20-cv—02473-TLN, 2020 WL 7624950 at *4 (E.D. Cal. Dec. 22, 2020) (applying rational basis review and finding salon and other plaintiff businesses were unlikely to succeed on substantive due process challenge in similar COVID-19 constitutional challenge); Pro. Beauty Fed'n of California v. Newsom, No. 20-cv-04275-RGK, 2020 WL 3056126 at *6 (C.D. Cal. June 8, 2020).

Lastly, the Court agrees with Defendant that Plaintiff's Addison Rae allegations, see Opp'n at 11 (referring the Court to Addison Rae allegations at ¶ 49 of the complaint), do not affect

the rational basis analysis. See Reply at 4. Under rational basis review, it is "entirely irrelevant . . . whether the conceived reason for the challenged distinction actually motivated the legislature." F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993). The relevant question is whether the Government "could have had a legitimate reason for acting as it did." Sagana, 384 F.3d at 743. As explained above, the Court finds the Government could have. The inquiry ends there.

Plaintiff's substantive due process claim thus fails as a matter of law. Because no additional fact discovery would alter this conclusion, Plaintiff's first claim is dismissed with prejudice. See Deveraturda v. Globe Aviation Sec. Servs., 454 F.3d 1043, 1046 (9th Cir. 2006) (explaining a district court need not grant leave to amend where amendment would be futile).

2. Equal Protection Claim

Plaintiff next asserts an equal protection claim. Compl. ¶¶ 70-77. Plaintiff alleges that "Defendants intentionally and arbitrarily categorized individuals, businesses and conduct as either 'essential' or 'non-essential.'" Id. ¶ 72. According to Plaintiff, these classifications of "essential" and "nonessential" violated the Equal Protection Clause. Opp'n at 9-10.

The Equal Protection Clause prohibits the government from drawing arbitrary distinctions between individuals based solely on differences that are irrelevant to a legitimate governmental objective. See City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985). The first step in an equal protection analysis is to "identify the state's classification of groups."

Gallinger v. Becerra, 898 F.3d 1012, 1016 (9th Cir. 2018) (internal citation omitted). The next step is to "look for a control group composed of individuals who are similarly situated" and "if the two groups are similarly situated, then determine the appropriate level of scrutiny." Id. Plaintiff bears the burden of pleading that others are similarly situated and how they are similarly situated. Washington v. White, No. 18-cv-00333-WHO, 2018 WL 2287676 at *7 (N.D. Cal. May 18, 2018)(internal citation omitted).

Defendants first contend that Plaintiff has not plausibly alleged that "essential" and "non-essential" businesses are similarly situated groups. Mot. at 9. Defendants further contend that even if Plaintiff had identified a similarly situated group, its equal protection claim would still fail under rational basis review. Id. at 10-11.

As an initial matter, the Court agrees with Defendants that rational basis review is the applicable standard because "no suspect class is involved and no fundamental right is burdened." Kahawaiolaa v. Norton, 386 F.3d 1271, 1277-78 (9th Cir. 2004) (internal citation omitted). Specifically, as the Ninth Circuit has recently reiterated, the right to pursue a business enterprise is not a fundamental right, and business owners, including salon hair owners, are not a "suspect class." See Slidewaters LLC, 2021 WL 2836630 at *7; see also Tandon, 992 F.3d at 930 ("[B]usiness owners are not a suspect class, and the district court correctly applied rational basis review to their equal protection claims.") Rational basis review thus applies.

"Courts are compelled under rational-basis review to accept

a legislature's generalizations even when there is an imperfect fit between means and ends." Heller v. Doe by Doe, 509 U.S. 312, 321 (1993). Under rational basis review, the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Armour v. City of Indianapolis, Ind., 566 U.S. 673, 681 (2012) (internal citations omitted).

Here, Plaintiff has not met its burden. At least one conceivable basis for the non-essential designation is that limiting activity at non-essential businesses, such as Plaintiff's, would curb the spread of COVID-19 by limiting the interactions indoors between individuals from different households. See Pro. Beauty Fed'n of California v. Newsom, No. 2:20-CV-04275-RGK-AS, 2020 WL 3056126, at *7 (C.D. Cal. June 8, 2020) ("The Stay at Home Order has a legitimate purpose—namely, curbing the spread of COVID-19. Additionally, the challenged designations between essential and non-essential businesses promote that purpose.") Thus, the challenged essential/non-essential classifications survive rational basis review.

Plaintiff's equal protection claim fails as a matter of law. Finding amendment would be futile, the Court dismisses Plaintiff's second claim with prejudice. See Deveraturda, 454 F.3d at 1046.

3. Procedural Due Process Claim

Plaintiff's third claim is a procedural due process claim. Compl. ¶¶ 78-101. In particular, Plaintiff complains that the Orders provide "no opportunity for a hearing, no appeal, and no reconsideration" and that its "rights to freely operate its

lawful businesses and earn a living were stripped away without so much as a hearing." Opp'n at 12.

The Ninth Circuit, however, has specifically rejected the notion that the Due Process Clause requires this type of process before enacting and enforcing laws of general applicability. Halverson v. Skagit County, 42 F.3d 1257, 1260-61 (9th Cir. 1994). "[G]overnmental decisions . . . not directed at one or a few individuals do not give rise to the constitutional procedural due process requirements of individual notice and hearing; general notice as provided by law is sufficient." Id. at 1261.

Plaintiff does not dispute that the challenged Orders applied to large numbers of individuals and businesses across California. See Opp'n. Yet, Plaintiff fails to address Halverson. Id. Instead, Plaintiff cites to several cases involving government action directed toward an individual, not orders of general applicability. Id. at 12-13 (citing to Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Zinermon v. Burch, 494 U.S. 113 (1990); and Bd. of Regents of State Colleges v. Roth, 408 U.S. 564(1972)). As these cases are readily distinguishable, they do not save Plaintiff's claim.

Nor does Plaintiff's additional argument based on California law save its procedural due process claim. Opp'n at 13; see also Compl. ¶ 84. Specifically, Plaintiff argues that "California courts have found that if a local official declared a quarantine, then certain procedures must be followed" and here they were not followed. Opp'n at 13 (citing to Ex parte Martin, 83 Cal. App. 2d 164 (1948) and to Cal. Health and Safety Code § 120130(c)). However, this argument is foreclosed by sovereign immunity

because Plaintiffs sued Defendants in their official capacities and therefore the lawsuit is de facto against the state which cannot be sued in federal court based on California law. Reply at 4 (citing to Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 106 (1984)). Though Defendants raised the sovereign immunity issue in their motion, see Mot. at 11, Plaintiff failed to address it in opposition. See Opp'n.

In sum, because the challenged Orders are clearly governmental decisions of general applicability that do not target individual salon owners, Plaintiff was not entitled under Halverson to individualized notice or the right to be heard. Further, Plaintiff's arguments based on state law are foreclosed under Pennhurst. Plaintiff's procedural due process claim thus fails as a matter of law. This claim is dismissed with prejudice as the Court finds amendment would be futile. See Deveraturda, 454 F.3d at 1046.

4. Excessive Fines/ Cruel and Unusual Punishment Claim

Plaintiff brings two claims under the Eighth Amendment: an excessive fines and a cruel and unusual punishment claim. Compl. ¶¶ 102-110. Plaintiff's theory seems to be that Defendants' Orders cause unemployment among its principals, employees, and independent contractors which in turn inflicts cruel and unusual punishment on those who lose their jobs through massive social, economic, and health costs. Id. ¶¶ 103-105. Plaintiff further alleges that as long as the orders remain in place, it remains "subject to criminal cases (i.e. misdemeanor citations and fines), have their business licenses suspended or withdrawn, or have their utilities shut off by the DWP based on the future

enforcement of the Regional Orders by their local Sheriff's Department." Id. ¶ 62. Defendants contend both Eighth Amendment claims fail because Plaintiff has not identified a particular fine or punishment, let alone one that would violate the Constitution. Mot. at 2, 12-13; Reply at 5.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST., amend. VIII. The excessive fines clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense." U.S. v. Bajakajian, 524 U.S. 321, 328 (1998) (internal citations omitted). The government violates this clause when it assesses a fine that is "grossly disproportional to the gravity of a defendant's offense." Id. at 334.

Here, Plaintiff has not plausibly alleged that the government assessed a fine against it or "punished" it in any other way. Significantly, there is no allegation that the State levied a fine specifically against Plaintiff. Reply at 5. Rather, Plaintiff raises a novel theory as to how "selective enforcement and arbitrary punishment" – which Plaintiff alleges have taken place - can constitute a fine. See Opp'n at 15. However, Plaintiff does not bring forward any authority supporting its theory. Plaintiff's excessive fines claim therefore fails as a matter of law.

As to the cruel and unusual punishment clause, the protections of this clause attach only after a person has been convicted of a crime. Ingraham v. Wright, 430 U.S. 651, 664. Here, Plaintiff does not allege it has been convicted of a crime.

See Compl. Additionally, Plaintiff has not brought forward any caselaw supporting the idea that as a corporate entity, it may bring a cruel and unusual punishment claim. Thus, Plaintiff fails to state a cruel and unusual punishment claim.

Both Eighth Amendment claims are dismissed with prejudice because the Court finds amendment would be futile. See Deveraturda, 454 F.3d at 1046.

5. Freedom of Assembly Claim

Plaintiff's final claim is a freedom of assembly claim. Compl. ¶¶ 111-119. Although Defendants urge the Court to analyze Plaintiff's claim as a Fourteenth Amendment freedom of intimate association claim, see Mot. at 13-14, Plaintiff has clearly pled a First Amendment claim and the Court analyzes it as such.

The First Amendment protects individuals from undue interference with their freedom of speech, assembly, and expressive association. U.S. CONST., amend. I; see also De Jonge v. Oregon, 299 U.S. 353, 364 (1937). Today, freedom of association and freedom of assembly claims are largely viewed and analyzed as one. See Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Parties may only bring this type of claim if they demonstrate that they are asserting their right to associate "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." Id.

Here, Plaintiff has not made that threshold showing. In fact, there are no allegations that even attempt to identify expressive conduct or speech triggering First Amendment protections. For instance, Plaintiff does not allege that its

customers get together to express a particular message. See Compl. Plaintiff alleges only that "by denying Plaintiff Pomp Salon the ability to conduct their nail, hair and skin services" Defendants are "in violation of the Freedom of Assembly Clause." Compl. ¶ 114.

In addition to the lack of factual allegations identifying any protected speech or conduct, Plaintiff has not brought forward caselaw supporting the idea that the interactions at the salon may trigger First Amendment protection. See Opp'n. By contrast, Defendants cite to City of Dallas v. Stanglin, 490 U.S. 19 (1989), in support of their argument that Plaintiff's ordinary commercial activities are not protected. Mot. at 13-14; Reply at 5. In City of Dallas, the Supreme Court held that teenagers' meetings in dance halls were not protected under the First Amendment, explaining that "it is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall - but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." 490 U.S. at 25. Likewise, here while it might be possible to find a "kernel of expression" in the gathering of Plaintiff's clients' at the salon, that is insufficient to trigger First Amendment protection.

Because Plaintiff has not shown that the non-expressive conduct at issue here triggers the protection of the First Amendment protections, rational basis scrutiny applies. See Calm Ventures LLC v. Newsom, No. CV 20-11501-JFW(PVCx), 2021 WL 1502657 at *7 (C.D. Cal. March 25, 2021). For the same reasons

discussed above in the analysis of Plaintiff's substantive due process and equal protection claims, the Court finds the Orders clearly survive rational basis review: the Orders were enacted for the legitimate purpose of curbing the spread of COVID-19 and are rationally related to that purpose because the Orders reduce the number of people from different households mixing indoors where the spread of COVID-19 occurs most readily.

Accordingly, Plaintiff's fifth claim fails as a matter of law. This claim is dismissed with prejudice as the Court finds amendment would be futile. See Deveraturda, 454 F.3d at 1046.

E. Sanctions

A violation of the Court's standing order requires the offending counsel (not the client) to pay $50.00 per page over the page limit to the Clerk of Court. Order re Filing Requirements at 1, ECF No. 4-2. Moreover, the Court does not consider arguments made past the page limit. Id.

Plaintiff's opposition brief exceeds the Court's page limit by 1.5 pages. See Opp'n. Plaintiff's counsel must therefore send a check payable to the Clerk for the Eastern District of California for $75.00 no later than seven days from the date of this Order.

III. ORDER

For the reasons set forth above, the Court GRANTS Defendants' motion to dismiss WITH PREJUDICE.

IT IS SO ORDERED.

Dated: August 4, 2021

JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE